No. 88-2137

In The

Supreme Court of the United States

October Term, 1988

MICHAEL MCMONAGLE, et al.,

Petitioners,

vs.

NORTHEAST WOMEN'S CENTER, INC.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondent Northeast Women's Center, Inc. provides a variety of women's health services, including abortions. Petitioners are twenty-six individuals opposed to abortion who, over a period of several years, personally engaged in a series of often violent actions inside and outside the respondent's offices. Petitioners' goal was to force the Center to stop providing abortion services. In the course of the actions, petitioners committed a variety of unlawful acts, including but not limited to extortion, assault and criminal trespass. At trial, respondent established that petitioners had violated the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1964(c), by, *inter alia*, engaging in a pattern of racketeering activity. The predicate acts shown were extortions of the respondent and its employees, as defined under the Hobbs Act, 18 U.S.C. Section 1951. Respondent was awarded $887 in damages under RICO and $42,087.95 in damages under a state-law trespass claim. Individuals opposed to abortion who participated in demonstrations but did not commit unlawful acts were not sued and were not held liable and are not parties to this petition.

1. Are defendants who are personally found to have committed acts of extortion and trespass immunized from damage liability by the First Amendment where the damages assessed were found to directly and proximately flow from their unlawful acts?

COUNTER STATEMENT OF QUESTIONS PRESENTED (Cont.)

2. Are enterprises which conduct their affairs through a pattern of extortion immune from liability under RICO absent proof of an underlying profit motive?

3. Does a plaintiff corporation have standing under RICO to assert as predicate acts the defendants' attempted extortion of plaintiff's employees' rights to continue their employment with plaintiff?

4. Where it is shown that defendants attempted to force plaintiff and its employees to abandon their entitlements to make business decisions freely and/or enter into contracts freely by means of fear or threats of force or violence, has the plaintiff established violations of 18 U.S.C. Section 1951 for purposes of a civil *RICO* claim?

5. Where respondent's assertion that petitioners failed to preserve an issue for review is unchallenged before the court of appeals does the court of appeals commit error if it accepts respondent's argument?

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STATEMENT OF THE FACTS

1. Respondent Northeast Women's Center, Inc. is a Pennsylvania corporation which provides pregnancy testing, routine gynecological services, abortions, counseling and community education in Northeast Philadelphia. (Preliminary Injunction Hearing, Day 2, pp. 29-30).[1] Thirty-five percent of the patients of the Northeast Women's Center receive abortions, and the clinic provides abortion services to patients up to the sixteenth week of pregnancy. Ninety-five percent of the patients who obtain abortions at the NEWC do so in the first trimester of pregnancy. (Preliminary Injunction Hearing, Day 2, pp. 29-30).

Petitioners are twenty-six individuals who believe that abortion is wrong. One of the defendants, Michael McMonagle, is the Executive Director of the Pro-Life Coalition of Southeastern Pennsylvania ("Coalition.")[2] Eight other defendants are active members of the Board of Directors for the Coalition. (N.T. 2-9).[3] Defendant McMonagle is paid $32,000 per year by the Coali-

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[1] The clinic advertises its services in the metropolitan Philadelphia area, and spends approximately $14,000 per year in radio, magazine and telephone book advertising in New Jersey. (N.T. 3-30). Five percent of its clients come from states other than Pennsylvania or from other countries. (Preliminary Injunction Hearing, Day 2, p. 30).

[2] The Coalition is not and was never a party to this case.

[3] The convention we will use here to refer to the record is as follows. We will refer to the Notes of Testimony as N.T. in this brief. We refer to the Petition as Pet., and the Appendix as Pet. App. Our appendix will be referred to as Res. App.

tion, which raises approximately $120,000 per year in revenue. (N.T. 9-43 - 9-44).

Four Coalition fundraising letters written and signed by defendant McMonagle were read to the jury. (p-44; N.T. 2-86 - 2-89). In them, McMonagle stated that:

> Our organization has been working very hard in 1985 to generate opposition to abortion chambers in Southeast Pennsylvania. Fortunately, this opposition has already resulted in one abortion chamber closing *** and made possible the closing of another one by the end of the year. ***
>
> In March, 1985 we received the welcome news that the Northeast Women's Center abortion chamber at 9600 Roosevelt Boulevard *** would not have its lease renewed. The administrator of this abortion chamber attributed this denial of lease renewal to the protest against the abortion chamber which our Northeast Pennsylvania Chapter has generated *** this abortion chamber lost its lease because of the prayers and protests of Pro Life citizens ***

McMonagle mailed these fundraising letters to some 2,500 persons in the metropolitan Philadelphia area, including some in surrounding states. (N.T. 9-25).

2. The defendants took a variety of actions designed to force plaintiff out of business, its employees to resign, and its patients to forego their constitutionally protected right to receive abortion information and services from plaintiff. These activities included: forcibly invading and seizing the clinic in order to prevent it from providing abortions to its patients; physically assaulting patients and staff; physically blocking patients and employees from entering the clinic; causing plaintiff to lose its lease

and to relocate; and targeting staff members for intimidation and harassment at the clinic and at their homes until they resigned from their employment at the NEWC.[4]

Invasions of the Clinic

At trial plaintiff established that on five occasions – three times after this lawsuit was begun – the defendants forcibly invaded its offices, seized its business, and physically prevented patients from receiving abortions.[5] The defendants admitted that these activities were planned in advance by persons active in the Pro-Life Coalition of Southeastern Pennsylvania. (N.T. 7-79). The evidence showed that these actions were not peaceful sit-ins, but violent and destructive acts of intimidation.

On December 8, 1984 some fifty persons stormed into plaintiff's offices. Thirty-one persons were arrested, including 12 defendants.[6] (N.T. 4-70). In order to enter the clinic, they knocked down and ran over the clinic's Administrator. (N.T. 8-57 - 8-58). When one of the staff resisted a defendant's forcible attempt to enter a room in

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[4] The defendants admitted using these exact same tactics in forcing another abortion clinic in Bridgeport, Pennsylvania to close. (N.T. 2-86 - 2-89; 9-29 - 9-31). Even after being enjoined by the Common Pleas court to cease their activities at that clinic, the defendants continued to engage in them, and were found in contempt of Court for their actions. (N.T. 9-30).

[5] McMonagle admitted that the invasions, which he referred to as "rescue missions," were conducted "for the purpose of preventing abortions from being performed while [the defendants] were inside." (N.T. 9-30).

[6] At the time of the trial, the criminal charges arising from the December 8, 1984 invasion had not come to trial in the Philadelphia judicial system. (N.T. 4-70 - 4-71).

which she was drawing blood from a 15 year-old patient, one defendant repeatedly slammed the door into the arms and leg of the staff member causing her to receive lacerations on her arms and leg, and collapse on the floor. The attack resulted in injuries to her neck and back to such a degree that she required medication, had to wear a neck brace, and missed ten days of work. (N.T. 8-59, 6-48 - 6-53). When confronted with the injuries, the defendant informed her that she needed to stop "murdering babies." The 15 year-old patient was reduced to tears by the incident. (N.T. 8-59). As the defendants were removed from the offices by the police, they shouted "Where is Glick?[7] We want Glick! You know, if you think its bad this time, its going to be worse." (N.T. 8-62). The jury was shown still photographs of the defendants inside the clinic, as well as photographs of the syringes which they had thrown on the floor after seizing the operating room. (N.T. 9-88 - 9-91).

On August 10, 1985 twelve persons – all defendants – invaded the clinic, were arrested and later convicted of defiant trespass. (N.T. 4-86). To gain entry, the defendants forced their way through a door, injuring two staff members in the process, one of whom lost time at work as a result of her injuries. (N.T. 8-115 - 8-117; Preliminary Injunction Hearing, Day 2, p. 39). They seized and locked themselves into the operating room, and staff saw one defendant, who was wearing a windbreaker even though it was a hot and muggy day, leave the room with objects hidden under his jacket. (N.T. 8-116 - 8-117). After the

[7] Richard Glick, M.D. was the medical director of the clinic at the time.

defendants were removed by the police, surgical equipment which had been operational earlier in the day had metal instruments jammed into their motors, and parts were missing. Anti-abortion stickers had been placed upon surgical equipment and elsewhere throughout the room. (N.T. 8-117 - 8-118; 9-93 - 9-95). The surgical machines were inoperable, and had to be replaced that day by the NEWC's home office before surgery could be performed.[8] (N.T. 9-95).

On October 19, 1985 forty persons, including 33 defendants, were arrested at the NEWC during an attempted invasion. Two defendants actually entered the clinic by knocking down the acting clinic administrator and rushing through the doors. The doors were locked before the rest could enter. (N.T. 9-110 - 9-112). After the police arrived and removed the two, the acting administrator ventured into the lobby and witnessed a number of defendants blocking the doors to the building and the clinic. One of the defendants grabbed her and attempted to pull her down, but she escaped back into the clinic. (N.T. 9-112 - 9-114).

It was then learned that two of the defendants had made an appointment for an abortion under assumed names and were in the waiting room. When asked to leave by the police, one turned to the patients and said: "Don't kill your baby. Don't listen to them. They lie to you. JEWS LIE! JEWS LIE!" (N.T. 4-59). The effect of this

[8] The machines were eventually repaired and equipment replaced at a cost of $887.00 to the clinic, which was the amount awarded to the plaintiff by the jury under the RICO count. (Exhibit 73).

activity on the patients caused them to weep, and one to collapse and require an intravenous blood transfusion. (N.T. 4-83 - 4-85).

On May 23, 1986 twenty-six persons, including 16 defendants, invaded the clinic. All were convicted of criminal conspiracy, disorderly conduct, and/or defiant trespass. (N.T. 4-74 - 4-76). The jury was shown a videotape of the invasion, and defendant McMonagle admitted that the defendants had been correctly identified in the presentation of the tape to the jury. (N.T. 9-37 - 9-38). One defendant was seen on videotape vowing to force the clinic out of business. (N.T. 5-34). During the invasion, the defendants were seen shouting and waving brochures in the faces of patients. They were heard telling the patients:

> They're going to cut you. They're going to take your money. They're going to rip your baby apart. *** They're going to kill you. They're going to hurt you. (Preliminary Injunction Hearing, Day 1, p. 35; Day 2, p. 5).

Finally, on August 6, 1986, 75-100 persons blocked the doors to the new offices of the NEWC, including 14 defendants. (N.T. 3-59 - 3-64; 3-67). The jury was shown a videotape of the incident. This attempted invasion was foiled only by the presence of sophisticated security equipment which had been purchased by the NEWC and installed in the new facility to which it had moved after losing its lease. (Memorandum and Order dated June 8, 1987, p. 11).

Activities Outside the Clinic

At trial respondent also relied on videotapes of the petitioners' activities. These videotapes were entered into evidence, P-76 and P-77, and were reviewed by the trial court, the jury and the court of appeals. (Pet. App. 8).[9] The tapes show patients surrounded by mobs in full blown riot conditions. They show defendants physically struggling with and pulling at patients who are physically caught in a tug of war while attempting to walk into the Center. They show the defendants wrapping patients up in "Pro-Life" banners to prevent their movement. Staff members are shown being knocked into walls and bloodied, being intimidated by mobs. Their cars are attacked when entering the clinic, and the doctor's car is halted while a mob surrounds it and screams vicious insults at him, calling him "Dr. Mengele" and the like.

Andrew Greenberg, Esquire, formerly a District Attorney assigned to deal with NEWC arrest cases and to develop policy with the police concerning the activities. there, testified about his experience at the clinic. (N.T. 7-60 - 7-61). He went to the NEWC in December of 1985 to observe the defendants' activities to better understand

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[9] Petitioners' suggestion that respondent acted improperly in "distilling" the videotapes introduced into evidence from the many hours of available tape, Pet. 5, is disingenuous at best. At the behest of the petitioners, the trial court had issued a pretrial ruling *requiring* plaintiff to edit the videotapes to ensure that the jury saw only scenes in which defendants, or persons having a proven nexus with defendants, appeared. (Pet. App. 134, 139). The court reviewed the tapes out of the presence of the jury to ensure compliance with the order. (E.g., N.T. 4-19, 4-40).

them for case preparation purposes, and arrived at 7:30 a.m. so as not to be seen by the defendants. (N.T. 7-61 - 7-62). He stood near closed windows in the third floor office and watched from behind drawn curtains. (N.T. 7-63). He saw a variety of the defendants and a crowd of some 40-50 persons. They gathered around defendant McMonagle when he took out a bullhorn, and he harangued them to continue their activities. (N.T. 7-63, 7-79 - 7-81).

The activities which McMonagle was encouraging and which were engaged in by a number of the defendants were described by Mr. Greenberg:

> As the patients would walk down this long sidewalk in front of the building, the protesters who were up against the barricades were yelling things at them in very loud voices. I was up on the third floor, the windows were closed, it was December and it was cold and I could hear very, very clearly what the people were saying: "They are going to kill your baby. Don't kill your baby. They are going to rip your insides out." This from all 40 to 50 people. (N.T. 7-81).

Ugly threats were also directed at staff:

> As I was standing upstairs at the window *** I happened to be standing next to Kate Strauser and I was standing there and you could hear individuals, but more than one yelling things when Kate would pull the curtain aside and put her face in the window. It would generate a reaction and you would hear "Kate Strauser, come down here, Kate Strauser. Come down here Jenny Kirby. Are you afraid to come down here Kate Strauser?" (N.T. 7-82).

The former District Attorney testified that he waited until he was absolutely certain that all of the demonstrators had left the site before leaving the clinic that day, because the frenzy of the crowd made him fear for his own physical safety. (N.T. 7-85).

One of the clinic's physicians also testified. He described how his car was surrounded every Saturday as he enters the clinic by crowds who hate him. As a result, he was no longer able to drive to the clinic alone and had to meet a security guard who drove him through the crowd in a truck. (N.T. 6-68 - 6-69). Even then, the truck was surrounded and the taunts continued:

> I am filled with feelings of fear. I know that my heart starts to race, that I have thoughts about my own well being. *** I start to tremble and I would say that my thought processes become a bit strained *** I feel shaky. (N.T. 6-69, 6-71).

The defendants' tactics towards plaintiff's employees succeeded in inducing several to quit their jobs.[10] Mary Banecker, the former Administrator of the clinic, quit her position with plaintiff due to the stress and harassment inflicted by the defendants. She had been knocked down and witnessed the violence and staff injuries inflicted during the defendants' December 8, 1984 invasion. She had seen an increasingly hostile group of defendants engage in increasingly threatening behavior:

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[10] One quit due to the stress and harassment and returned months later, only after the clinic had purchased sophisticated security equipment and hired security guards. (N.T. 6-52 - 6-53).

> I had seen Joseph Wall and Stephanie Morello be part of the group where they were screaming at a woman and child as they were entering the building where [the] Northeast Women's Center was housed and one of the people they started screaming at was this young child, "Don't go in there. They're killing babies. They're killing babies." And, this child started to scream and cry and he continued to yell at this child. (N.T. 8-75).

She resigned her position at the NEWC after the second invasion in August of 1985:

> I was really fearful of not understanding what these people's limits were in terms of trying to intimidate me and frighten me and I at several points was fearful of my life, that was the first time in my life that the possibility that someone would physically hurt me because of the work I did. It absolutely enraged me because I had children and I was really afraid that I would not be able to protect them from these people. (N.T. 8-66).

After she resigned, the harassment ceased. (N.T. 8-70).[11] Other executive staff members were similarly targeted and forced to resign. (N.T. 3-29, 4-16 - 4-18, 4-25).

We will not attempt here to catalog the numerous examples of the intimidating and threatening conduct of the defendants that were set forth in the 14 day long trial. We will summarize some here. These include: staff members testifying that they cannot leave the clinic without being screamed at; (N.T. 9-96) defendants jumping on staff cars as they arrive and pounding on their windows;

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[11] Other staff members testified that defendants had made pointed inquiries about the safety of the staff's children, and whether someone was watching them at that moment. (N.T. 9-96).

(N.T. 9-97) staff members being told that they will "fry in hell, rot in jail;" (Preliminary Injunction Hearing, Day 2, p. 36) defendants knocking over police barricades; (N.T. 4-40) defendants photographing patients; (N.T. 4-40, 3-79, 3-37) patients having to crawl under police barricades to enter the clinic for surgery; (N.T. 3-78) and defendants blocking the entrance to the clinic with banners. (N.T. 3-80).

With the exception of Michael McMonagle none of the current defendants took the stand to deny or rebut any of the charges against them.

3. On May 20, 1986 the jury returned with its verdict and answered a specific series of interrogatories prepared by the Court. The jury found, *inter alia*, that:

> 27 defendants were associated with or employed by an enterprise engaged in or affecting interstate commerce;
>
> 22 defendants had personally committed at least two acts of extortion with respect to the clinic and its employees;
>
> 5 defendants had conspired with those found to have committed extortion;
>
> the Northeast Women's Center had suffered damages in the amount of $887.00 as a result of the racketeering enterprise;
>
> 24 defendants had trespassed into the Center and the NEWC had suffered $42,974.95 in damages as a result;
>
> three defendants had intentionally and improperly interfered with the performance of a contract between the Center and its employees, but no damage resulted from such activities. Pet. App. 253-60.

4. On appellate review the Third Circuit affirmed the judgment.[12] On the issues relevant to this petition, the Third Circuit held: that the district court's instructions to the jury concerning the First Amendment were correct and proper and the jury had properly found that the actions of the defendants went beyond mere dissent (Pet. App. 13-14); that the defendants' political motives on abortion did not immunize them from statutes proscribing the very acts the jury found the defendants committed; (Pet. App. 12-13, 15-16); that the extortion of plaintiff's employees was directly related to defendants' goal of destroying plaintiff's business (Pet. App.16, n.8); and that the evidence showed that the defendants had in fact attempted to extort from plaintiff its property interest in continuing to provide abortion services. (Pet. App. 16).

REASONS FOR DENYING THE WRIT

The Petitioners' presentation of the facts both in their statement of facts and as they relate them in their argument, is delusive. Petitioners repeatedly suggest to this

[12] Petitioners' summary of the Third Circuit's ruling, Pet. 7, is inaccurate. Neither the Third Circuit nor the district court held that evidence of participation in one or more sit-ins was sufficient to permit a finding of Hobbs Act extortion. Additionally, neither the appellate court nor the trial court affirmed imposition of liability based on the jury's finding that a suction aspirator device had been dismantled, since the jury made no such finding. Rather, both courts reviewed all of respondent's evidence, considered the specific legal challenges raised by the petitioners, and concluded that the verdict in favor of respondent was proper.

Court that the only evidence against them was their conducting four peaceful sit-ins. (E.g. Pet. 13). Given the extensive and virtually unrebutted evidence of violence and intimidation presented below, and the court's finding on the matter,[13] such a position is untenable and deceptive.

Rather than accurately describing the evidence of their own violent conduct, petitioners discuss at length various peaceful and protected protest activities which have occurred outside respondent's office over the years. They refer to other individuals who have participated in those protected activities. Yet they decline to mention that those individuals who engaged in peaceful and protected protest activities are not and were never parties to this case. The petitioners here are those who exceeded the bounds of protected activity and engaged in violent and unlawful activities.

The Third Circuit specifically noted this distinction, which respondent has been careful to observe. "The Center has emphasized throughout the litigation that it is not challenging Defendants' free speech right to make public their opposition to abortion. Instead, this lawsuit was brought alleging illegal and tortious activity by Defendants that went beyond Defendants' constitutional rights of speech and protest." (Pet. App. 5-6).

Apart from this distortion, the petitioners include a number of factually incorrect statements. For example,

[13] "The Center pleaded and proved that defendants embarked on a willful campaign to use fear, harassment, intimidation and force against the Center ***." (Pet. App. 27-28.)

the district court never ruled that "the jury could not consider in its deliberations any evidence other than the four sit-ins in which petitioners had participated," (Pet. 3), nor does the citation offered by petitioners support this assertion.[14]

It is not practical for respondent to attempt to catalogue the distortions, omissions, and misstatements offered by respondents, although a selection of examples appear in the margin.[15] Suffice it to say that petitioners'

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[14] Petitioners assert that the district court concluded that apart from the invasions of the Center, "all of the other activities *** were protected by the First Amendment and could not form the basis for civil RICO liability." Pet. 6. This is untrue. The district court correctly concluded that while peaceful protest activities were indeed protected "[t]he First Amendment will not *** offer a sanctuary for violence *** The forcible, unauthorized entry into the Center's facilities is not protected conduct. Neither can the breaking of an automobile tail light or the inflicting of bodily injury scurry behind the First Amendment for refuge." (Pet. App. 93). Thus, evidence of other violent activities of petitioners was properly considered.

[15] Petitioners state that "[t]he jury found that there had been no robbery and that *petitioners had not extorted from the plaintiff's patients their right to obtain abortion or other services.*" (Pet. 6) (emphasis in original.) This is incorrect. The jury was instructed (without objection) that in order to establish a pattern of racketeering activity, plaintiff had to establish two acts of extortion or robbery. (N.T. 14-18 - 14-19). Consistent with this, the jury interrogatories directed that if the jury found a pattern of racketeering activity, it should identify, for each defendant, the two acts of racketeering activity committed. Interrogatories for the Jury, 4. Since the jury found that the petitioners engaged in extortion of the Center and extortion of its employees, it had no need to decide whether the petitioners

(Continued on following page)

inaccurate and incomplete presentation of the facts and discussion of the lower court opinions is in itself sufficient ground for denying the writ. Rules of the Supreme Court, Rule 21.5.

Apart from the problematic factual presentation of petitioners, the record in this matter is not generally adequate for review of the issues raised. This is so largely because of petitioners' failure to raise issues below or to raise them clearly and with appropriate legal support. For example, petitioners assert that a conflict exists between the result here and the holding of *NAACP v. Claiborne Hardware Co.*, 458 U.S 886 (1981). Yet petitioners never raised the applicability of *Claiborne* in the District Court. Nor did they propose any jury instructions concerning the issue.[16] Nor did they object to the First

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(Continued from previous page)

also engaged in robbery and extortion of patients. Certainly it never determined that petitioners did not do so.

The petitioners omit any mention of the trial court's extensive First Amendment instruction to the jury, or of the appellate court's review of that instruction, (Pet. App. 13-14), although the petitioners raise a First Amendment issue before this Court.

Petitioners state that "[h]ad the same conduct as was engaged in by petitioners been undertaken to create general mayhem *** the courts below would have such conduct remedied by a claim for violation of state laws *** rather than by imposition of civil RICO liability ***." (Pet. 11-12). There is simply no basis for this peculiar assertion, and petitioners cite no evidence that this is true.

[16] We have included all of defendants proposed points for charge in our appendix. None of their proposed points seeks a *Claiborne* instruction. Res. App. 1a-11a.

Amendment charge given by the District Court. Res. App. 12a-19a. Similarly, the defendants did not present the issues raised by their fourth or fifth questions to the appellate court.[17] This is hardly an appropriate record on which to grant review.

Finally, petitioners' hyperbole notwithstanding, this is not a remarkable case, nor does it establish new legal standards. This case is nothing more than an instance in which respondent successfully established the facts necessary to prevail on a RICO claim in a novel circumstance. It stands for nothing more than the proposition that where a group of people engage in a pattern of unlawful and violent extortionate conduct they may be held liable under RICO for that conduct.

In order to amplify the importance of this matter, petitioners repeatedly misstate the holding of the Third Circuit. The appellate court did not approve imposition of damages regardless of whether the damages were directly and proximately caused by the unlawful acts, as petitioners state. Pet. 8. The appellate court's interpretation of RICO and the Hobbs Act does not jeopardize the legacy of Dr. Martin Luther King and the right to engage in peaceful and lawful protest.

Petitioners rely heavily on citations to other pending cases in a variety of jurisdictions to demonstrate the

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[17] In the appellate court, petitioners argued that respondent could not recover for extortion of an intangible property right, a position the Third Circuit clearly rejected. (Pet. App. 16-17). They did not raise the fourth issue presented here. Petitioners presented no response whatsoever to respondent's waiver argument before the Third Circuit. (Pet. App. 9, n.4).

significance of this case. The mere existence of other litigation, assuming it arises from factually similar circumstances (an assumption not supported in the record here) does not elevate the questions presented here to some greater level of importance. Moreover, if as petitioners suggest, numerous similar cases are indeed pending, then the Court will have an opportunity to review the matters involved here on a record in which the issues were properly preserved and a petition which is better grounded in accuracy.[18]

Petitioners' specific points are without merit. There is no conflict between this decision and *Claiborne*. The defendants in this case were found liable only after the jury specifically found that they themselves had engaged in extortionate actions. They proposed no jury instructions below on this issue. The trial court charge on the First Amendment is not challenged here, nor was it objected to below. Both lower courts carefully scrutinized this case to insure that liability was properly imposed only for damages resulting from unlawful conduct, not from protected activities.

Petitioners' second and fourth arguments are closely intertwined. In essence, they assert that there can be no RICO liability absent proof of a profit motive and that petitioners must actually obtain something from respondent in order to commit extortion. The Third Circuit's

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[18] Petitioners cite to a number of newspaper articles and other sources which were not in the record below and the accuracy of which is open to question. (See, e.g., Pet. 8, n.9). Respondent objects to the inclusion of such factual materials in the brief or appendix.

holding on these points is unremarkable. It recognizes simply that seeking to gain control and power over a business by extortion, whether for profit motives or for other reasons, is an evil that can be addressed through RICO. It is entirely compatible with a substantial body of federal law.

Petitioners' third argument also raises a question on which the federal courts are in complete accord. It is hardly noteworthy that where the target of an extortion is an employee's right to continue his or her employment, the employer as well as the employee may complain of an injury under RICO and the Hobbs Act.

Petitioners' final point – that they are entitled to argue an issue that was waived below – is makeweight and cannot be seriously considered.

I. The District Court's Careful Instructions Concerning the First Amendment – Which Were Not Objected to – and its Special Interrogatories to the Jury Insured That Defendants Were Held Liable for Their Own Acts and the Damages Which Flowed from Those Acts.

The District Court was careful to instruct the jurors that the defendants could not be held liable for any protected First Amendment activity. It instructed them that:

> The First Amendment of the United States Constitution guarantees the defendants a right to express their views. The defendants have a constitutional right to attempt to persuade the Northeast Women's Center to stop performing abortions. They have a constitutional right to attempt to persuade the Center's employees to stop working there and they have

> a constitutional right to attempt to persuade the Center's patients not to have abortions there ***. The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to a protest.
>
> Speech does not lose its protective [sic] character simply because it may embarrass others or coerce them into actions. Peaceful speaking and picketing, leafletting and demonstration, cannot be a claim for extortion.
>
> *** However, the First Amendment does not offer a sanctuary for violators ***.
>
> Forceful, unauthorized entry on another's property is not constitutionally protected. N.T. 14-21 - 14-22.

The defendants did not object to the instruction. (Res. App. 12a-19a). The court then required that the jury answer detailed special interrogatories in reaching its verdict. The jury was required to specifically name individuals who it had concluded had committed at least two acts of extortion at the clinic, and to identify the extortions involved. The jury specifically named 22 petitioners who it found had each committed two acts of extortion. It specifically named 5 petitioners who it found had each conspired with those who had committed extortion. (Pet. App. 253-60).

The Court of Appeals reviewed this charge and relied upon it in reaching its conclusion that the verdict here complied with the requirements of the Constitution:

> We would have grave concerns were these or any other defendants held liable under civil RICO for engaging in the expression of dissenting political opinions in a manner protected under the First Amendment. The district court's careful instructions

to the jury with respect to the scope of the protections of the First Amendment precluded such a result here. (Pet. App. 13).

Petitioners' assertions that this result[19] conflicts in some way with *NAACP v. Claiborne Hardware Co.*, 458 U.S 886 (1981) misreads that decision. Nothing contained in *Claiborne* remotely suggests that defendants who engage in unlawful actions during demonstrations may not be punished for their own actions. To the contrary, Claiborne states that:

> the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained. 458 U.S. at 927.

The quotations from Claiborne that petitioners cite all involve the question of when the unlawful actions of some demonstrators may lead to the liability of an organization such as the NAACP. The Court was clear in its opinion that such organizational liability could not be imposed without strict proof of the organization's overall involvement in lawlessness. But no organization is a defendant here, and this case does not present the question of the defendants' liability for the actions of others. Petitioners here *themselves* engaged in unlawful conduct and were held liable for the damages proximately caused by that conduct.

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[19] Although the petitioners complain about the result in this matter, they do not state what was incorrect about the jury instructions, or the special interrogatories which led to that result. This is the case, we believe, because the petitioners did not object to the charge or the interrogatories on this basis.

Petitioners attempt to bolster their argument with an account of various activities that occurred outside respondent's office. (Pet. 12-13). Unaccountably, their account fails to mention the specific extortionate activities which formed the basis for liability. See, Counterstatement of the Facts, *supra*.

Petitioners were held liable based on repeated and often violent acts of trespass and extortion, not on the basis of conduct protected by the First Amendment or on the basis of association with others. The damages assessed were those attributable to the unlawful acts.[20] Respondent did not recover damages from individuals who did not participate in unlawful activity, nor did it recover damages beyond those that flowed from the unlawful activities.[21]

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[20] Petitioners make reference to the award of attorney's fees in this matter. Petitioners challenged this award in a separate appeal that is now pending before the Third Circuit. NEWC v. McMonagle, et al., No. 88-1644 (argued July 10, 1989). The propriety of the award of attorney's fees is not at issue here.

[21] The RICO damages arise from the destruction of medical equipment during one of the petitioners' forcible occupations of the NEWC's office at a time when the petitioners were in exclusive control of the room where the equipment was kept.

The trespass damages represent the cost of additional security precautions taken by the respondent following repeated trespasses by the petitioners and in light of their avowed intention to continue to commit forcible trespass. The uncontested evidence of record is that the increased security expenses were a direct consequence of petitioners' repeated unlawful acts.

In sum, this case presents no inconsistency with *Claiborne* or any other precedent of this Court. Further, petitioners' First Amendment rights were fully protected by the trial court's charge. Therefore, there is no significant issue presented here for review.[22]

II. The Decision of the Court Below Not to Impose Upon Plaintiff a Burden of Proving Defendants' Economic Motive is Entirely Consistent with the Prior Decisions of This Court.

Petitioners' second question raises an issue of the proper interpretation of the RICO statute.[23] Petitioners contend, in effect, that proof of a profit motive should be included as an element of a RICO cause of action.[24] As

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[22] Petitioners' references to other pending cases that may or may not be similar to this case, (Pet. 8-9, 14, n. 21), do not add weight to their argument. Petitioners' constitutional rights were carefully protected, and there is no viable claim to the contrary. Therefore, on the record here there is no constitutional question presented. Whether or not other cases may, if and when fully litigated, raise constitutional issues is not a question the Court could resolve by reviewing this case.

[23] The jury instructions that defendants' proposed below contained no requirement of profit motive, (Res. App. 1a-11a), and they did not object to the charge given to the jury on this ground. (Res. App. 12a-19a).

[24] Contrary to the statement in petitioners' submission, (Pet. 19, n. 22), respondent did introduce evidence of petitioners' successful efforts to profit from their unlawful activities. Petitioners raised over $120,000 a year and petitioner McMonagle received $32,000 per year on the basis of fundraising letters which bragged about their unlawful actions at the clinic. The Third Circuit noted this evidence but declined to pass on its sufficiency in view of its conclusion that proof of a profit motive was not necessary. (Pet. App. 15 n. 7).

the petitioners themselves note, this is an issue that rarely arises. It is therefore not a contention of particular significance. Further, petitioners' contention is not one supported by the words of the statute or by governing precedent.

This Court has had occasion to rule on the proper interpretation of RICO in the past. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4954 (June 26, 1989); *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 498 (1985). Indeed, it has specifically identified the elements required to establish a cause of action.

> A violation of Section 1962(c) *** requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.
>
> • • •
>
> [T]he statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in Section 1962(c), "an activity which RICO was designed to deter."

Sedima, supra, 473 U.S. at 496-97.

This Court has never suggested that plaintiffs in RICO cases have any burden to prove defendants' motives. On each occasion where it has done so, this Court has observed that the Congressional drafters elected to design a broad and far-reaching statute. The Court has consistently refused to limit the reach of RICO to some narrow class of offenses or activities, instead noting the breadth of its language in the scope of the offenses included.

The position proposed by defendants is contrary to the repeated declarations of the Court. This case would offer little more than yet another opportunity to remark yet again upon the breadth of the RICO statute.

The Court of Appeals' opinion is not an extension of RICO but rather is consistent with existing law.[25] In these cases defendant's motive is to gain power over the victim. That motive is shared by the petitioners here. Petitioners here sought, through a pattern of racketeering activity, to gain power over respondent in order to dictate respondent's business activities. It is no unwarranted extension of RICO to include within its breadth activities aimed at acquiring power over another.

While it is true that this case is at odds with *United States v. Ivic*, 700 F.2d 51 (2nd Cir. 1983), this is not sufficient reason to allocate this Court's time to the question proposed by petitioners. *Ivic* is over six years old and has not lead to development of a line of cases.[26] That decision predated this Court's decision in *Sedima*, and the

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[25] In *United States v. Green*, 350 U.S. 415 (1955), a union representative defendant used threats to obtain jobs for certain union members in violation of the Hobbs Act. There is no consideration of whether defendant was animated by a profit motive, by a desire to enhance his or the union's power, or by political beliefs. The Court noted that the Hobbs Act was aimed at particular conduct, and whether the individual obtained any benefit was of no concern. See also *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979).

[26] *Ivic* is the only case in conflict with this case. The remaining cases cited by the defendants essentially distinguish *Ivic* in that they uphold racketeering convictions, finding that sufficient motive was shown. It was therefore unnecessary for those courts to reconsider the holding of *Ivic*.

Second Circuit has not had occasion to reconsider the point since.[27] There is no active split in the circuits.

Finally, the position advanced by petitioners is without merit. Petitioners seek a ruling that would create an additional element to a RICO claim – proof of a profit motive. Under the petitioner's theory, a plaintiff that proved a pattern of extortion and arson could not recover under RICO if it could not sustain its burden of proving the defendants' motives. Nothing in the statute itself points to such a requirement.

As a matter of policy, it is difficult to see why animus should immunize conduct which, if done for profit, would be unlawful. For example, if a group of individuals committed a series of extortions to gain control of a business, determination of whether that conduct violated RICO might turn on whether the individuals were motivated by greed (which would place them outside petitioners' proposed exemption) or some other animus. If the individuals acted out of racial or political animus, for example, instead of greed, then they fall within petitioners' proposed exemption and could not be prosecuted under RICO.[28]

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[27] It is questionable whether the constricted reasoning of the Second Circuit in *Ivic* is valid in light of this Court's repeated expansive constructions of RICO.

[28] Under petitioners' theory, Iranian terrorists who firebomb bookstores that sell Salman Rushdie's novel would do so free of fear of RICO liability, since their motives are religious, and not for profit.

III. The Decision Below Permitting Extortion of Plaintiff's Employees to be Predicate Acts is Unremarkable and Consistent with the Prevailing Caselaw.

The defendants assert that this case creates a conflict between various circuits as to whether extortion directed at a plaintiff's employees can comprise part of a pattern of racketeering activity.[29] There is in fact no conflict between the circuits on this question and it was correctly resolved below.[30] The single appellate decision cited by defendants as being in conflict with the opinion below, *Yellow Bus Lines, Inc. v. Union Local 639*, 839 F.2d 782 (D.C. Cir. 1988), is entirely harmonious with the Third Circuit's opinion.

In *Yellow Bus* the court of appeals specifically permitted consideration of four instances of extortion in the form of direct threats of violence directed to plaintiff *or its employees*. The court did not consider additional acts of

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[29] The defendants have never questioned that, assuming extortion of the employees was properly included as a predicate act, plaintiff's proof of that act together with conspiracy to commit extortion of the plaintiff constitutes the requisite pattern. Indeed, the defendants' own proposed charge conceded that proof of two predicate acts was sufficient. (Res. App. 2a).

[30] Petitioners are disingenuous in stating that the extortion of plaintiff's employees should be discounted because the plaintiff did not suffer any "cognizable injury" as a result of its having several executive level employees forced from their jobs due to fear. (Pet. 23). There is no requirement under RICO that plaintiff prove separate damages for each predicate act alleged. Moreover, attempted extortions, which are clearly predicate acts under RICO, often involve situations where no financial loss results.

extortion aimed at persons or property not connected with plaintiff.

While the Third Circuit had no occasion in this case to consider the relevance of threats aimed at persons or property not connected with the plaintiff, it reached the same conclusion as the District of Columbia Circuit with regard to threats directed to employees – that is, that those extortionate acts, directed at individuals connected with plaintiff, could be used to establish the requisite pattern of conduct required under RICO.

The conclusion reached by the Third Circuit is sound. It is obvious that where extortion is directed to the employees of a business, with the aim of forcing the employees to quit their employment, the extortion harms not only the employee, but also the employing business.

IV. There is No Conflict or Reason of Importance to Review the Question of Whether Hobbs Act Violations Requires Proof that an Exortioner Actually Obtain the Object of the Extortion.

Petitioners' fourth issue raises a question of proper interpretation of the Hobbs Act, 18 U.S.C. Section 1951. The petitioners point to no inconsistency between circuit court decisions nor any other factor which raises this question to a level of substantial importance. Indeed, the Third Circuit's decision here is completely consistent with an established body of federal law. There is no reason to review it.[31]

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[31] At trial, defendants proposed an instruction modeled upon the standard Devitt & Blackmar jury instruction, which stated that in order to prove extortion, the defendants would

(Continued on following page)

The object of the extortion here was respondent's right to operate its business and to make business decisions freely. The right to make business decisions freely is an intangible property right. Many circuits in a variety of settings have recognized that extortion of an intangible property right may be a proper subject of a Hobbs Act violation. *See, e.g., United States v. Local 560*, 780 F.2d 267 (3d Cir. 1985); *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978); *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969).

Where an intangible property right is at stake, the extorter often cannot take possession of it him or herself, nor can he or she direct that it be given to a third party. By their very nature, intangible property rights are ofter not transferable. The purpose of the extortion is not to acquire the intangible right but rather to deprive the victim of it or to extinguish the right. Thus, in *Local 560*, the defendants did not obtain the members' rights to a democratically elected union leadership. Rather they forced the members to abandon them. In none of the above cited cases did the defendant obtain the property interest which was the object of the extortion.[32]

(Continued from previous page)

have to have been shown to "induced or caused [the respondent] to part with property." (Res. App. 3a). Their argument here is entirely at odds with the instruction they sought below.

[32] The ultimate object of the extortion in most of these instances is to gain power or control over the victim's business by forcing the victim to give up its right to control its own business. That is precisely the object of the extortion conducted

(Continued on following page)

Because the decision here represents no departure from established law, but merely an application of a substantial body of precedent, it does not warrant review by this Court.

V. There is Nothing Exceptional About the Court of Appeals' Refusal to Review the Merits of an Issue Below, Where Petitioners did not Respond to Respondent's Assertion of Waiver.

Petitioners' final issue is makeweight and presents at best a narrow and non-recurring factual question with regard to application of the Federal Rules of Civil Procedure.

In the appellate court, respondent asserted that petitioners had failed to preserve an issue[33] for review because they had not presented appropriate objections to the charge in the district court. The Court of Appeals noted that petitioners neither contested our assertion of waiver, nor did they point to any place in the record that the issues involved were in fact preserved. Based on respondent's argument, which was unopposed and properly supported with citations to the record, the Third Circuit found that petitioners had indeed waived certain issues. (Pet. App. 9, n.4).

Whether the Court of Appeals was obliged to scour the record to find support for petitioners' position in the

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(Continued from previous page)

here. Petitioners sought to gain sufficient power or control over respondent to substitute their own decisions for those of respondent. Clearly the petitioners meant to acquire and exploit power over the respondent.

[33] The issue itself involves the measure of trespass damages under state law.

absence of a response from them on the point is dubious at best. Asserting that the issue rises to one of exceptional national importance meriting Supreme Court review is utterly without foundation.

The question presented here is unlikely to have any impact on any case apart from this one. It presents an extremely unusual series of waivers and/or alleged waivers, unlikely to recur with any frequency. Certainly it is not in conflict with any other decisions of the courts of appeal.[34]

CONCLUSION

Respondent respectfully requests that the writ of certiorari be denied.

Respectfully Submitted,

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[34] While petitioners assert in the caption for this argument that there is a split in the circuits on this point, they do not offer citations to any conflicting opinion.

RESPONDENT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.	:	CIVIL ACTION
Plaintiff	:	
vs.	:	
MICHAEL McMONAGLE, et.al.	:	
Defendants	:	NO. 85-4845

DEFENDANTS' PROPOSED POINTS FOR CHARGE

Defendants, by their counsel, submit the attached proposed points for charge to the jury.

Respectfully submitted,

THERESA MALLON CONNOLLY, ESQ.

RACKETEER INFLUENCED CORRUPT ORGANIZATION

In order to prove a violation of the Racketeer Influenced Corrupt Organization Act, the Northeast Women's Center must prove the following four essential elements by a preponderence of the evidence:

(1) that the defendants engaged in a pattern of racketeering activity (defined by the commission of two [2] predicate acts alleged to be robbery and extortion). The commission of one predicate offense is legally insufficient to constitute a pattern;

(2) the existence of an enterprise affecting interstate commerce;

(3) a nexus or link between the pattern of racketeering activity and the enterprise; and

(4) an injury to its business or property by reason of the above.

[141, *Civil RICO 1986*, Practising Law Institute, p. 21].

EXTORTION

One of the acts of racketeering activity alleged committed by the defendants is that of extortion. Extortion means the obtaining of property from another with his consent, induced by the wrongful use of actual or threatened force, violence, or fear.

In order to establish the crime of extortion, the Northeast Women's Center must prove the following three elements by a preponderence of the evidence:

(1) that the defendants induced or caused the Northeast Women's Center to part with property;

(2) that the defendants did so by an "extortion" as I have defined; and,

(3) that in so doing, interstate commerce was delayed, interrupted, or adversely affected.

[§56.04 Fed. Jury Practice, Devitt & Blackmar]

ROBBERY

One of the acts of racketeering activity alleged committed by the defendants is that of robbery. In order to establish the crime of robbery, the Northeast Women's Center must prove the following five elements by a preponderence of the evidence:

(1) that the defendants forcibly took and carried away

(2) with the specific intent to steal

(3) the personal property of the Northeast Women's Center

(4) taken from the person of another by violence or putting in fear

(5) and with the intention to permanently keep the property so taken.

United States vs. *Medley*, 255 F.2d. 350 (2d Cir. 1958)

ANTITRUST CLAIM

Proof of injury to the Northeast Women's Center's business is insufficient to establish an antitrust violation

absent further proof that such an injury amounted to an unreasonable restraint of trade.

In order to find against these defendants on the antitrust claim, you must find that the defendants' conduct constituted an actual, unreasonable, and substantial restraint on trade or commerce. [II, Kintner, Federal Antitrust Law, §9.1, 5 (1980); Order of this Court, 2/17/87, page 7.]

The Northeast Women's Center must also show either an anticompetitive intent [and there is no evidence to indicate that any of the defendants are competitors of the Northeast Women's Center] or an antitrust effect [and the Northeast Women's Center has stipulated that it could prove no loss of business]. *Franklin Music vs. American Broadcasting Company*, 616 F.2d 528 (3d cir., 1979). Therefore, on the antitrust claim advanced by the Northeast Women's Center against these defendants, I direct that you enter a verdict on behalf of all defendants.

INTENTIONAL INTERFERENCE WITH CONTRACTS

The Northeast Women's Center has claimed that these defendants have intentionally interfered with their contractual relations with third parties. A person who causes a third person not to perform a contract is responsible for the loss suffered as a result of the breach or prevention of that contract. Because the Northeast Women's Center has claimed no loss or damage from the breach or prevention of any such contracts, I direct that you enter a verdict on behalf of all defendants.

TRESPASS

These defendants are charged with a civil trespass, which is different from the crime of defiant trespass. A civil trespass is caused if the defendants entered land in the possession of the Northeast Women's Center.

If you find from the evidence that the Northeast Women's Center was legally entitled to possession of the land which is the subject of the lawsuit, and that the defendants entered thereon with no lawful right to do so, and if you also find the evidence to be insufficient to establish that the Northeast Women's Center sustained any damage as a result of defendants' conduct, then you should award the plaintiff a nominal sum, such as one dollar, in damages. [Jury Inst. in Damages in Tort Actions, Douthwaite]

If you find that the Northeast Women's Center has suffered a damage as a result of the activities of the defendants, the Northeast Women's Center is entitled to recover the lesser of two figures, which are arrived at as follows:

(1) One figure is the reasonable expense of necessary repair of the property and the difference in the fair market value of the property immediately before the occurrence and the fair market value after the property is repaired;

(2) The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

You may award property damage for the lesser of these two figures only.

[Devitt & Blackmar §86.01]

Respectfully submitted,

THERESA MALLON CONNOLLY, ESQ.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.,	:	CIVIL ACTION
VS.	:	No. 85-4845
MICHAEL MCMONAGLE, et al.	:	
	:	

DEFENDANTS' PROPOSED POINTS FOR CHARGE

Defendants Linda Corbett, Thomas Mc Ilhenny, Patricia Mc Namara, and Pasquale Varallo, by their counsel, Thomas J. Short, Esquire, submit the following proposed points for charge:

1. Issue: *NO INFERENCE OF CONSPIRACY FROM A COMMON DEFENSE* REQUESTED INSTRUCTION: Counsel for the various Defendants have sat together here throughout the trial. At times, they have joined in objections and have shared the same defense exhibits. You have seen them join together in conference at times. Since their clients have been brought to Court and have been alleged to have committed similar conduct, counsel are entitled to sit together and to cooperate and even join in a common defense. My instruction to you is that this fact does not constitute evidence that any of the defendants were associated in any conspiracy. You are to draw no inference from any collaboration of counsel that any Defendant of one counsel was associated with a Defendant of another counsel based merely on the association of the attorneys.

SOURCE: *United States vs. Manufacturers' Association of the Relocatable Building Industry*, CR No. 70-945-SAW (N.D. Calif. 1971), aff'd. 462 F.2d 49 (9th Cir. 1972).

2. ISSUE: *DEFENDANTS NEED TO BE JUDGED SEPARATELY* REQUESTED INSTRUCTION: You should consider each instruction given to apply separately and individually to each Defendant. For example, Mr. Mc Ilhenny is entitled to be treated as a separate Defendant from anyone else, as is Mrs. Linda Corbett, and so on. Each Defendant is entitled to individual consideration of the evidence as applied to them to determine whether that particular Defendant participated in any combination or conspiracy.

Stated another way, Each Defendant has a right to that kind of consideration given on your part as if he or she were being sued alone.

SOURCE: (1st proposition) *Reno-West Coast Distribution Co. vs. Mead Corp.*, 613 F.2d 722 (9th Cir. 1979).

(2nd proposition) *Coughlin vs. Capital Cement Co.*, 571 F.2d 290 (5th Cir. 1978).

3. ISSUE: *MEMBERSHIP IN AN ASSOCIATION IS NOT, BY ITSELF, AN INFERENCE THAT A PERSON IS PART OF A CONSPIRACY.* REQUESTED INSTRUCTION: A person who is a member of an association such as the Pro-Life Coalition of Southeastern Pennsylvania, cannot be held to be a coconspirator merely by reason of the person's membership in the association. The person must be shown to have knowledge of any conspiracy purpose and participation is also required. Further, any proof of similar behavior between individuals, coupled with the

thought that one of the individuals might be a coconspirator, does not alone conclusively establish an agreement.

SOURCE: *Northern California Pharmaceutical Assoc. vs. United States* (CA 9 Cal.) 306 F.2d 379, cert. den. 371 U.S. 862 (19__)

4. ISSUE: *RESIDENTIAL PICKETING AND FIRST AMENDMENT* REQUESTED INSTRUCTION: It is a general premise in law that all streets, even those located in residential areas, are public forums. Further, there is no question that picketing, *per se*, is a valuable and protected form of communication. Residential picketing, quite clearly, brings the message the picketers wish to communicate right to the home. More importantly, the fact that the communicated message may reach and disturb families and children is clearly part of the point of the picketing. (SOURCE: *Schultz vs. Frisby*, 807 F.2d 1339 (7th Cir. 1986).) Communication or deliverance of a message through residential picketing may be uncomfortable to the recipients or targets of the picketing. The activity itself, however, is a protected activity by the First Amendment of our Constitution. Should you conclude that Defendants' actions of residential picketing induced or caused any interference with or nonperformance of a contract that Plaintiff had with a third party, you must find that Defendants are protected against liability for this tort by their First Amendment right of free speech. Further, if you conclude that any residential picketing was only a partial cause of a contract interference or nonperformance, you still may not attribute liability to the home picketers for the impact that picketing had on any contract. (SOURCE: *Feminist Women's Health Center,*

Inc. v. Mohammed, 586 F.2d 530 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979).)

In this case, before you can find that Defendants are liable for the tort of intentional interference with contract relations, you must first determine what actions of the Defendants supposedly induced or caused the nonperformance of the contract. If you then conclude that Defendants were taking these actions which may have caused interference out of (1) an exercise of an absolute right such as Free Speech, or (2) out of a need to protect a third party, or (3) because they were advocating issues in the public interest, then Defendants may not be found liable for the resulting interference.

It is also important that you be convinced any Defendant to whom you would attribute liability for contract interference *actually* had an intent to induce or cause a third party not to perform. (SOURCE: *Runyan v. United Brotherhood of Carpenters*, 566 F. Supp. 600 (D. Colo. 1983).

5. ISSUE: *PREDICATE ACTS - RICO - EXTORTION AND ROBBERY* REQUESTED INSTRUCTION: Before you can find each Defendant liable under the Racketeer Influenced Corrupt Organization allegation, you must find that each and every Defendant committed any combination of two offenses involving Robbery and Extortion. In other words, you must find either two robberies, two extortions, or a robbery and an extortion. In this regard, it was the plaintiff's burden to convince you that two of these offenses were committed by each and every Defendant. You must assess the conduct of each defendant as you recollect it and determine if you can attribute two of

these offenses to each and every Defendant. In performing this chore, you cannot attribute a robbery or an extortion act to any Defendant unless you are convinced that each and every element of those crimes has been proven to you by the Plaintiff. This was the Plaintiff's burden to accomplish. It was not the Defendants' burden to disprove it.

In this regard, you may not find that a robbery was committed unless you can find that property was actually taken from the Plaintiff with an intent to deprive the Plaintiff of that property and this taking of property was somehow facilitated by violence or intimidation that resulted in the taking of the property. You may not find that any extortion was committed unless you conclude that Defendants unlawfully obtained something of value from Plaintiff by means of threat or coercion. Extortion may only proceed from a corrupt mind. That means that there is a special mental element which constitutes a state of mind requirement for the crime to be committed. That mental element is corruption. Should you find that Defendants' conduct constituted persuasion, albeit persistent persuasion, to bring about a change of social conduct, and not conduct designed to exact a penalty from Plaintiff for not complying with a threat, then you may not find that extortion has been proven. SOURCE: Common Law.

Respectfully submitted,

/s/ Thomas J. Short 5/2/87
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(p. 14-46) Charge of the Court

opportunity on how they think I should respond. So it may take a little while, but perhaps, if you are stuck, and I am not saying you should be, but if you are stuck on RICO and you are waiting for an answer, you may want to go to trespass or you may want to go to something else and then go back to RICO. The whole process does not have to stop while you are waiting for to debate the issues out here.

May I see counsel at sidebar?

(Sidebar)

THE COURT: Why don't we do this, this will take a little while. I will excuse the jury.

(Open Court)

THE COURT: Members of the jury, this is an opportunity for counsel to tell me what they think about the charge and that will take a few minutes and I suggest you may want to leave and go back and just relax for a couple of minutes.

(Whereupon, the following transpired at sidebar, and the jury left the courtroom:)

THE COURT: Mr. Tiryak?

MR. TIRYAK: A couple of things. You talked about people, if they found somebody had been convicted of trespass criminally. I think you said you may consider that?

THE COURT: That's right.

MR. TIRYAK: We request they must find if they were convicted –

THE COURT: I know you did and I will overrule your objection.

MR. TIRYAK: Secondly, did they find that there was an enterprise, whose activities affected interstate commerce. I think the instruction and the interrogatory whether they affected or attempted to affect, because in the Jannotti case, for example, there it was never any possibility of the enterprise affecting interstate commerce.

THE COURT: You are probably technically correct, but I really don't think that's going to make that much difference, but I'll say wherever they affected or attempted the affect.

MR. TIRYAK: All Right.

THE COURT: I don't think that's serious.

MR. TIRYAK: This, I think, can be important. I am concerned the jury might assume, that is, if somebody invaded on August 10th, it would be our position that that person could have committed four predicate acts that day and I would like a further clarification that anyone of four predicate acts could be in one invasion. You don't have to show there were two invasions to show two predicate acts, but a combination of an extortion and a robbery or two extortions in the same invasion could be included.

When you talked about the damages on trespass, sir, you talked about being liable for physical harm. I may have missed it, but we obviously – one of our claims is the cost of hiring (p. 14-48) people to protect the property,

security guards and we would request you make it clear to the jury that's an element.

THE COURT: I think I did tell them.

MR. TIRYAK: You did say that later.

THE COURT: The dollar claim principally was the security cost. I will consider that. I am just wondering –

MR. TIRYAK: I am virtually certain under the law, they can't give a general awarding of punitive damages. They have to do it by defendant.

THE COURT: Oh, yes.

MR. TIRYAK: They have to list the people and the amounts. They just cannot order $100.00.

THE COURT: We ought to take those forms back and get that straightened out.

MR. TIRYAK: In order to make this brief, rather than repeating a bunch of things that I know you will not agree with can I just incorporate the argument on the directed verdict and to the extent that's inconsistent with your instructions, then exceptions will be granted?

THE COURT: Yes.

THE COURT: Who is next?

MR. SHORT: Judge, you gave on page 7 of the interrogatories I think it should be consistent with the language on page 4. On page 4, after you say, "Next to each name list the two acts of racketeering activity you find the (p. 14-49) defendant engaged in" and you call for a special finding of the two acts and on page 7, it's

possible something was omitted. Perhaps there brought in on the second theory –

THE COURT: As a co-conspirator they are liable.

MR. TIRYAK: They don't have to do any acts.

THE COURT: I will deny that.

MR. SHORT: On the – that was a clarification.

THE COURT: All right.

MR. SHORT: The other point is, on the difference, the trespass, you charge there is no material difference between defiant trespass and trespass.

THE COURT: Do you think there is?

MR. SHORT: In the Pennsylvania statute.

THE COURT: What is it?

MR. SHORT: It clearly distinguishes a person –

THE COURT: I think defiant trespass implies a higher –

MR. SHORT: It's a lesser degree. It's a grade lower.

THE COURT: What is the difference in the defiant trespass?

MR. SHORT: Defiant trespass is disobediance of an order to move, to get away.

THE COURT: If a policeman came into my house and ordered me to leave –

MR. SHORT: It's different.

(p. 14-50) THE COURT: No. It's disobediance of an order. The order has to be based on the law. What is the lawful right of an officer to charge somebody with defiant trespass?

MR. SHORT: If I had the Pennsylvania statute –

THE COURT: Somebody on the land of another, intentionally on the land.

MR. SHORT: When you have a fire –

THE COURT: I don't know whether it's defiant trespass. It may be some police action.

MR. SHORT: As a practical matter, it only affects Linda Corbett.

THE COURT: All right. What else do you have?

MR. VOLZ: Your Honor, in the instructions on robbery, there is nothing mentioned as to intent and I believe under the law, at least under the New York law, defendants have to have the intent to permanently retain property taken and under Pennsylvania law, the defendants have to have the specific intent to deprive the owner of that property. It is a specific intent crime and the instruction was more or less taking with force, however slight, and that intent to steal is missing.

MR. TIRYAK: I thought the Judge said, "intentionally enter the premises of another with the intent – "

THE COURT: I will tell them that.

MR. STANTON: Your Honor, again, just for the record, the punitive damages thing –

(p. 14-51) THE COURT: I understand.

MR. STANTON: One of the reasons where it points out it's unfair as I indicated in the motion, you have said during the instructions, the motive, no matter how well –

THE COURT: Outrageous conduct. In other words, I can believe – I don't know why I use an example, but I can believe what I am doing is well motivated. I think when you cut the hands off everybody who gambles, that's one way to curb gambling. Motive is a personal thing.

MR. STANTON: I understand that.

THE COURT: I hate to tell you, what I was reading from, was pretty standard. It's at least bold print.

MR. STANTON: Yes, it's the Restatement of Torts. His complaint had no mention of punitive damages.

THE COURT: His complaint said damages. The idea of a pre-trial memorandum sought of puts you on notice, but he said in his argument, he wanted punitive damages. I think the whole case of the plaintiff was that it was outrageous conduct.

MR. TIRYAK: You can't really argue extortion without claiming it was outrageous conduct.

MR. STANTON: I thought we would come down here today at 1:00 o'clock and go over the point for changes.

THE COURT: We wont offer them.

MR. STANTON: At 5:00, we went over it. Ms. Connolly wanted to bring out wealth is an issue of punitive damages.

(p. 14-52) MR. VOLZ: I will join with Mr. Stanton on that because we had several conferences and punitive was not mentioned until the has closing argument of counsel.

MR. SHORT: Maybe you can slip the jury a clarifying instruction, you can give them another page and you can send it out to them.

THE COURT: All right.

MR. STANTON: We do want the corrections suggested by Mr. Tiryak, but we're not waiving the objection to them getting punitive damages for the reasons stated.

MS. CONNOLLY: I join in all defendants' exceptions.

THE COURT: I think I will tell them to come in at 9:30 tomorrow morning and start the deliberations, rather then have them start now. I will send them home and change the page as to the punitive damages, that they have to name each person that they find punitive damages against.

MS. CONNOLLY: Is there any way you would reconsider letting them go out now?

MR. TIRYAK: I couldn't answer those questions now.

MS. CONNOLLY: I already answered them. I answered them quickly.

THE COURT: I know you could answer them.

(Whereupon, the following transpired in open court with all counsel and parties being present:)

THE COURT: Would you ask the jury to come back in, (p. 14-53) please?

(Whereupon, the jury entered the courtroom and the following transpired in open court in the presence and hearing of the jury:)

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